Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

DON R. HILL, Warden, *Petitioner*,

v.

EDDIE B. BELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Menefield* v. *Borg*, 881 F.2d 696 (9th Cir. 1989) the Ninth Circuit held that even if an accused had waived the right to counsel at trial, he or she was entitled to the appointment of counsel at a motion for new trial and that denial of such right was reversible per se.

1. Did the Ninth Circuit err in holding that because *Menefield* was binding circuit precedent, the Ninth Circuit was required to conclude that state courts would have felt bound to follow the *Menefield* rule even in the face of contrary state and federal court decisions?

2. Did the Ninth Circuit err in holding that *Menefield* was not a new rule within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989)?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No. _____

DON R. HILL, Warden, *Petitioner*,

v.

EDDIE B. BELL, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Petitioner Don R. Hill, Warden ("the Warden"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Unites States Court of Appeals appears at Appendix A to the petition and is reported at 190 F.3d 1089 (9th Cir. 1999).

The judgment of the United States District Court appears at Appendix B. The Order of the United States District Court adopting the Report and Recommendation of the United States Magistrate Judge appears at Appendix C. The Report and Recommendation of the United States Magistrate Judge appears at Appendix D.

The California Supreme Court orders denying Respondent Bell's petition for review and Respondent Bell's petition for writ of corpus appears at Appendix E.

The opinion of the California Court of Appeal affirming Respondent Bell's conviction appears at Appendix F.

JURISDICTION

The Unites States Court of Appeals issued an opinion on September 9, 1999, and denied the Warden's petition for rehearing on October 27, 1999. This Petition for Writ of Certiorari follows within 90 days. The Warden invokes the Jurisdiction of this Court under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Following a trial at which Respondent Bell ("Bell") chose to represent himself, Bell was convicted by a Los Angeles County Superior Court jury of second-degree robbery with two prior serious felony convictions and two prior felony convictions for which he had served separate prison terms. Bell's request for counsel to represent him at his motion for new trial was denied. Bell received a 13-year state prison sentence. The California Court of Appeal affirmed Bell's conviction on March 24, 1993. On June 23, 1993, the California Supreme Court denied review. On May 18, 1994, the California Supreme Court denied Bell's petition for writ of habeas corpus.

In 1994, Bell filed his First Amended Petition for Writ of Habeas Corpus in the United States District Court pursuant to 28 U.S.C. section 2254. Bell contended, among other things, that he had been denied his right to counsel at the hearing on his motion for a new trial. Bell based his claim on the 1989 decision of the Ninth Circuit in *Menefield* v. *Borg*, 881 F.2d 696, 701 (CA9 1989), which held that an accused who requests an attorney at the time of a motion for new trial is entitled to have one appointed, and that denial of this right is reversible per se.

The magistrate judge submitted a Report and Recommendation rejecting all of Bell's claims except for Bell's assertion that he had been denied his right to counsel at the new trial motion in violation of *Menefield*. The Report and Recommendation rejected the Warden's harmless error argument as contrary to *Menefield*. The Report and Recommendation acknowledged that California and other federal circuit courts had rejected *Menefield*, *see United States* v. *Tajeddini*, 945 F.2d. 458, 470 (CA1 1991); *People* v. *Ngau*, 229 Cal. App. 3d 1115, 1124, 280 Cal. Rptr. 2d 757, 762 (1991), but concluded that *Menefield* was the controlling law in the Ninth Circuit, and that the district court was bound by it. (Appendix D.)

The Warden objected to the Report and Recommendation on the basis that the magistrate judge's application of *Menefield* to the case constituted a prohibited new rule under *Teague* v. *Lane*, 489 U.S. 288 (1989). Overruling the Warden's objection, the district judge adopted the Report and Recommendation of the magistrate judge (Appendix C) and granted a writ of habeas corpus requiring the State to grant Bell a motion for new trial with counsel appointed, or to grant Bell a new trial. (Appendix B.)

The Warden appealed to the Ninth Circuit. Once again, the Warden contended that the granting of relief was erroneous under *Teague*. The Warden argued that the application of *Menefield* to this case was a new rule (a) because at the time Bell's conviction became final in 1993, California state courts would not have acted "objectively unreasonably, *O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997), in rejecting *Menefield*'s holding given the existence of contrary California and First Circuit authority; (b) because the state court would not have felt "compelled" to implement *Menefield*'s holding, *ibid*; and (c) because *Menefield* was not a decision of the United States Supreme Court and thus could not constitute dictating "precedent" within the meaning of *Teague*.

The Ninth Circuit affirmed in a published opinion, finding that the district court's application of *Menefield* was not a new rule because *Menefield* pre-dated Bell's robbery conviction, and because, as binding circuit precedent, *Menefield* itself required the Ninth Circuit to find that a state court "would have felt compelled" to grant Bell relief. One judge dissented. *Bell* v. *Hill*, 190 F.3d 1089. (Appendix A.)

The Ninth Circuit denied the Warden's Petition for Rehearing and Suggestion for Rehearing En Banc, but granted the Warden's Motion to Stay the Mandate pending the filing of a petition for writ of certiorari. (Appendix G.)

REASONS FOR GRANTING THE WRIT

I.

THE HOLDING OF THE COURT OF APPEALS, THAT BECAUSE *MENEFIELD* WAS BINDING CIRCUIT PRECEDENT THE NINTH CIRCUIT WAS REQUIRED TO CONCLUDE THAT STATE COURTS WOULD HAVE FELT BOUND TO FOLLOW THE *MENEFIELD* RULE EVEN IN THE FACE OF CONTRARY STATE AND FEDERAL COURT DECISIONS, SERIOUSLY UNDERMINES THE RULE OF *TEAGUE* v. *LANE*

In *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), this Court explicated the new rule doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), and emphasized the centrality of the *Teague* rule.

> Before a state prisoner may upset his state conviction or sentence on federal collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks the benefit is not "new." We have stated variously the formula for determining when a rule is new. See, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461, 467 (1993) ("A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final'") (quoting *Teague*, 489 U.S., at 301) (emphasis in original). At bottom, however, the *Teague* doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even

> though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U.S. 407, 414 (1990) (citation omitted). "Reasonableness, in this as in many other contexts, is an objective standard." *Stringer* v. *Black*, 503 U.S. 222, 237 (1992). *Accordingly, we will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.*
>
> The *Teague* inquiry is conducted in three steps. First, the date on which the defendant's conviction became final is determined. *Lambrix* v. *Singletary*, 520 U.S. 518, 527 (1997). Next, the habeas court considers whether "'a state court considering [the defendant's] claim at the time his conviction became final *would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.*'" *Ibid.* (quoting *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990)) (alterations in *Lambrix*). If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.

O'Dell v. *Netherland*, 521 U.S. at 156-57 (emphasis added).

In this case, the Ninth Circuit Court of Appeals held that because *Menefield* was binding circuit constitutional precedent, the court was required to conclude that a *state* court "would have felt compelled by existing precedent" to follow *Menefield*, and that this was true even though there were state and federal appellate decisions conflicting with *Menefield*. This is how the Ninth Circuit put it:

> The district court did not err under the second part of the *Teague* inquiry when it relied on *Menefield* because, under our precedent, at the time when Bell's conviction became final a state court would have felt compelled by existing precedent to conclude that the Constitution requires the appointment of counsel for a new trial motion. This is because prior to Bell's conviction we had already conclusively determined that the Constitution and Supreme Court precedent requires the appointment of counsel for a new trial motion, *see Menefield*, 881 F.2d at 697-99, and we are bound by that determination. *See United States v. Gay*, 967 F.2d 322, 327 (9th Cir.1992) ("[O]ne three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.").
>
> . . . .
>
> We are bound by *Menefield* and, therefore, we cannot now say that a state court would not have felt compelled by the Constitution and Supreme Court precedent to grant Bell counsel for his new trial motion. *Gay*, 967 F.2d at 327. This is true even though other federal courts and state courts have rejected our holding in *Menefield* because a prior decision from this court can only be revisited by a three-judge panel if it has been undermined by an intervening Supreme Court decision. *See Branch v. Tunnell*, 14 F.2d 449, 456 (9th Cir.1994).

Bell v. *Hill*, 190 F.3d at 1092-93.

The Ninth Circuit is clearly stating here that because *it* felt compelled to adhere to its circuit precedent in *Menefield*, a *state* court would have felt bound to follow the *Menefield* rule even in the face of conflicting First Circuit and California appellate authority in existence at the time Bell's conviction became final in 1993. *See*

United States v. *Tajeddini*, 945 F.2d 458, 470 (CA1 1991); *People* v. *Ngau*, 229 Cal. App. 3d 1115, 280 Cal. Rptr. 2d 757 (1991).[1]

This holding is a non sequitur. The fact that the Ninth Circuit senses a compulsion to follow its own *Menefield* rule simply does not mean that the California Court of Appeal "would have felt compelled" by *Menefield*. In fact, the California courts would *not* feel compelled to follow *Menefield*, because under California jurisprudence, California state courts are not bound by the decisions of lower federal courts even on federal questions. *See People* v. *Bradley*, 1 Cal. 3d 80, 86, 460 P.2d 129, 132, 81 Cal. Rptr. 457, 460 (1969). Indeed, the Ninth Circuit opinion seems to acknowledge as much when it states that "California courts . . . are free to reject our decision in *Menefield* . . . ." 190 F.3d at 1091. That being the case, it cannot also be true that a California state court "would have felt compelled" to follow the *Menefield* rule.

The Ninth Circuit's decision in this case seriously undermines this Court's holding in *Teague*. As just noted, the Ninth Circuit's decision would effectively require state courts to follow federal circuit constitutional precedent existing at the time a conviction becomes final, or risk the granting of federal habeas relief. And it would pose such a risk even where, as here, the existence of contrary federal and state court precedent constitutes a solid indication that the state court did not act "objectively unreasonably," *O'Dell* v. *Netherland*, 521 U.S. at 156, in rejecting circuit authority.

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1. *Tajeddini* and *Ngau* were cited by the district court (Appendix D) and by the dissenting opinion of Judge Rymer in this case, 190 F.3d at 1096. Indeed, *Ngau* was relied on by the California Court of Appeal in affirming Bell's conviction. The California Court of Appeal also cited, and obviously rejected, *Menefield*. (Appendix F.)

II.

THE NINTH CIRCUIT'S HOLDING THAT *MENEFIELD* WAS NOT A NEW RULE IS INCORRECT BECAUSE *MENEFIELD* IS NOT DICTATED BY THIS COURT'S PRECEDENT

A holding constitutes a "new rule" within the meaning of *Teague* unless it was "dictated" by precedent existing at the time the defendant's conviction became final. *O'Dell* v. *Netherland*, 521 U.S. at 156. The majority opinion of the Court of Appeals in this case does not even discuss the question whether *Menefield* was "dictated" by precedent of this Court, although it twice asserts that *Menefield* was "foreordained" by Supreme Court precedent. *See* 190 F.3d at 1091, 1093. To the Ninth Circuit, it was sufficient to avoid new rule status that in *Menefield* it had "relied exclusively on Supreme Court precedent" and that in *Menefield* it "conclusively determined" that the Sixth Amendment and Supreme Court precedent required the *Menefield* rule. 190 F.3d at 1092.

However, the cases of this Court cited by the *Bell* majority in support of *Menefield* clearly *do not dictate* the *Menefield* rule.[2/] Indeed, the court in *Menefield* itself

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2. *Estelle* v. *Smith*, 451 U.S. 454 (1981), held that a defendant had the right to the presence of his attorney at a court-ordered psychiatric evaluation which led to testimony against the defendant at the penalty phase in a capital case. *Mempa* v. *Rhay*, 389 U.S. 128 (1967), concerned the right to counsel at a revocation of probation and deferred sentencing. *United States* v. *Wade*, 388 U.S. 218 (1967), held that a criminal defendant was entitled to the aid of counsel at a post-indictment line up. In *White* v. *Maryland*, 373 U.S. 59 (1963), a capital case, this Court held the accused had a right to counsel when he entered a guilty plea before a magistrate. In *Douglas* v. *California*, 372 U.S. 353 (1963), this Court held that denial of counsel to indigent

virtually acknowledged this when it noted that it was deciding "a question of first impression in our circuit." *Menefield* v. *Borg*, 881 F.2d at 698; *see also* statement, *ibid*, that the Ninth Circuit "ha[d] never settled the question of whether a motion for a new trial is a critical stage of the prosecution . . . ."

The Ninth Circuit's holding that *Menefield* is not a new rule even though it obviously is not "dictated" by precedent of this Court seriously undermines *Teague* and merits review by this Court.

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criminal appellants on a first appeal violates the Fourteenth Amendment. In *United States* v. *Ash*, 413 U.S. 300 (1973), this Court held the Sixth Amendment does *not* grant the right to have counsel present at a post-indictment photographic display.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: January 20, 2000.

Respectfully submitted,

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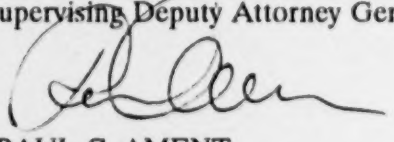

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDDIE B. BELL,	)	No. 98-55323
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV-94-04055-SVW
v.	)	
	)	OPINION
DON R. HILL, Warden,	)	
	)	
Respondent-Appellant.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted July 15, 1999[1]
Pasadena, California

Filed September 9, 1999

Before: Melvin Brunetti, Pamela Ann Rymer, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Brunetti;
Dissent by Judge Rymer

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1. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)

COUNSEL

Jerald L. Brainin, Esq., Los Angeles, California, for appellee Bell.

Paul C. Ament, DAG, Los Angeles, California, for the appellant.

OPINION

BRUNETTI, Circuit Judge:

Don Hill ("Hill"), warden of the California State Prison at Tehachapi, appeals from the district court's order granting Eddie Bell ("Bell") a writ of habeas corpus unless the State of California schedules a motion for new trial with appointed counsel or a new trial. We have jurisdiction pursuant to 28 U.S.C. § 1291, review the district court's order de novo, *see Eslaminia* v. *White*, 136 F.3d 1234, 1236 (9th Cir. 1998), and affirm.

I.

On November 6, 1990, Bell was sentenced to thirteen years in prison after a jury found him guilty of second degree robbery. Bell waived his right to counsel and represented himself during his robbery trial, but requested that the court appoint counsel to represent him for his motion for a new trial after the jury returned its guilty verdict. The state trial court, noting that California and other federal circuit courts had rejected our decision in *Menefield* v. *Borg*, 881 F.2d 696, 701 (9th Cir. 1989) ("We . . . hold that . . . an accused who requests an attorney at the time of a motion for a new trial is entitled to have one appointed"), denied Bell's request for counsel. Bell's conviction and sentence were affirmed on direct appeal

and the California Supreme Court denied Bell's petition for review.

On July 19, 1994, Bell filed his First Amended Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California pursuant to 28 U.S.C. § 2254. Bell challenged his 1990 robbery conviction and sentence alleging, *inter alia*, that he was denied his Sixth Amendment right to counsel when the state trial court refused to appoint counsel for his new trial motion. The district court, after adopting the report and recommendation of the Magistrate Judge, issued an order granting Bell a writ of habeas corpus unless the State of California scheduled either a motion for a new trial with appointed counsel or a new trial. The district court, via the Magistrate's report, reasoned that, under our decision in *Menefield*, the state trial court's refusal to appoint Bell counsel for his new trial motion violated Bell's Sixth Amendment right to counsel and was prejudicial per se. Hill appeals from the district court's order granting Bell habeas relief arguing that the district court's application of *Menefield* constitutes the impermissible application of a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989).

II.

[1] A state prisoner seeking federal habeas relief cannot benefit from a "new" court-made rule. *See Teague* v. *Lane*, 489 U.S. 288, 310 (1988). To determine whether a court-made rule is "new" under *Teague*, a federal habeas court must conduct a three step inquiry. *See O'Dell* v. *Netherland*, 521 U.S. 151, 156 (1997).

> First, the date on which the defendant's conviction became final is determined. Next, the habeas court considers whether a state court

> considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.

Id. at 156-57 (quotations and citations omitted). The district court's conclusion that the state court's failure to grant Bell counsel for his new trial motion was prejudicial per se did not constitute the impermissible application of a "new rule" under *Teague* because our decision in *Menefield* pre-dates Bell's robbery conviction and, under *Menefield*, a state court considering a request for counsel for a new trial motion made at the time of Bell's request would have felt compelled to conclude that the Constitution and Supreme Court precedent required the appointment of counsel as requested.

A.

[2] The district court did not err under the first part of the *Teague* inquiry because we decided *Menefield* before Bell was arrested let alone convicted for robbery and it has long been established that the denial of a criminal defendant's Sixth Amendment right to counsel is prejudicial per se. *See Menefield*, 881 F.2d at 701 n.7 (citing *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Chapman* v. *California*, 386 U.S. 18 (1967); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)). In other words, there is no issue under the first part of the *Teague* inquiry in this habeas proceeding because Bell is not seeking to avail himself of the benefits of a decision or rule decided or

announced after his conviction became final. *See O'Dell*, 521 U.S. at 156; *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994). This is true despite the fact that Bell bases his Sixth Amendment claim specifically on Ninth Circuit precedent rather than Supreme Court precedent. *See Gilmore* v. *Taylor*, 508 U.S. 333, 339-44 (1993); *Parke* v. *Raley*, 506 U.S. 20, 25-26 (1992).

In *Gilmore*, a habeas petitioner sought relief on the ground that a jury instruction given at his trial violated the Due Process Clause of the Fourteenth Amendment. *Gilmore*, 508 U.S. at 335. The United States Court of Appeals for the Seventh Circuit granted the petitioner habeas relief in light of its decision in *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), a case decided after the petitioner's conviction became final, concluding that *Falconer* did not announce a new rule under *Teague*. *See Gilmore*, 508 U.S. at 339. The Supreme Court reversed the Seventh Circuit not because *Falconer* was a circuit court case but because *Falconer* was decided after the petitioner's conviction became final and was not "foreordained" by Supreme Court precedent, thereby announcing a new rule under *Teague*. *See id.* at 344. The Supreme Court stated that "[s]ubject to two narrow exceptions, *a case* that is decided after a defendant's conviction and sentence become final may not provide the basis for federal habeas relief if it announces a 'new rule.'" *Id.* at 399-40 (quoting *Graham* v. *Collins*, 506 U.S. 461, 466-67 (1993)) (emphasis added). *Gilmore*, therefore, instructs that *Teague* bars the application of circuit court precedent that announces a new rule and post-dates a petitioner's conviction but does not prevent the application of circuit court precedent that pre-dates a habeas petitioner's conviction.

In *Parke*, the United States Court of Appeals for the Sixth Circuit relied on its decision in *Dunn v. Simmons*,

877 F.2d 1275 (6th Cir. 1989), when it granted relief to a habeas petitioner even though *Simmons* was decided after the petitioner's conviction became final. *See Parke*, 506 U.S. at 25-26. The Supreme Court recognized that the case presented a *Teague* issue because the Sixth Circuit relied on precedent that post-dated the petitioner's conviction not because the Sixth Circuit relied on circuit court precedent. *See id.* at 26.[2] *Parke*, therefore, further supports the conclusion that *Teague* does not bar the application of circuit court precedents that pre-date a habeas petitioner's conviction. Accordingly, the district court's application of *Menefield* in this habeas proceeding does not constitute the impermissible application of a new rule under the first part of the *Teague* inquiry because the district court applied circuit court precedent that pre-dates Bell's robbery conviction.

B.

[3] The district court did not err under the second part of the *Teague* inquiry when it relied on *Menefield* because, under our precedent, at the time when Bell's conviction became final a state court would have felt compelled by existing precedent to conclude that the Constitution requires the appointment of counsel for a new trial motion. This is because prior to Bell's conviction we had already conclusively determined that the Constitution and Supreme Court precedent requires the appointment of counsel for a new trial motion, see *Menefield*, 881 F.2d at 697-99, and we are bound by that determination. *See United States* v. *Gay*, 967 F.2d 322, 327 (9th Cir. 1992) ("[O]ne three-judge panel of this court

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2. The Supreme Court did not resolve the *Teague* issue presented in *Parke* because the Commonwealth of Kentucky did not argue the *Teague* issue in the Sixth Circuit. *See Parke*, 506 U.S. at 26.

cannot reconsider or overrule the decision of a prior panel.").

[4] In *Menefield*, we held "that the right to counsel attaches to the motion for a new trial stage." *Menefield*, 881 F.2d at 699. To reach this holding, we relied exclusively on Supreme Court precedent addressing the Sixth Amendment right to counsel, *see id.* at 698 (citing *Estelle* v. *Smith*, 451 U.S. 454, 471 (1981); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *United States* v. *Wade*, 388 U.S. 218 (1967); *White* v. *Maryland*, 373 U.S. 59 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *United States* v. *Ash*, 413 U.S. 300 (1973)), and concluded that "[u]nder *Ash*, although the state trial court expressed doubt as to the significance of the motion, we think there can be little question that the motion for a new trial under California law is a critical stage of the prosecution." *Id.* at 699. We went on to quote the Supreme Court stating that "[t]he presence of trained counsel at [the motion for a new trial] insures that the most favorable arguments will be presented and 'that the accused's interests will be protected consistently with our theory of criminal prosecution.'" *Id.* at 699 (quoting *Wade*, 388 U.S. at 227.). Thus, in *Menefield*, we conclusively determined that the Sixth Amendment and Supreme Court precedent addressing the Sixth Amendment right to counsel compelled the conclusion that counsel must be appointed for a new trial motion when such counsel is requested.

[5] We are bound by *Menefield* and, therefore, we cannot now say that a state court would not have felt compelled by the Constitution and Supreme Court precedent to grant Bell counsel for his new trial motion. *Gay*, 967 F.2d at 327. This is true even though other federal courts and state courts have rejected our holding in *Menefield* because a prior decision from this court can only be revisited by a three-judge panel if it has been

undermined by an intervening Supreme Court decision. *See Branch* v. *Tunnell*, 14 F.3d 449, 456 (9th Cir. 1994). The California courts, like other federal courts outside of the Ninth Circuit, are free to reject our decision in *Menefield* and persons convicted in state courts are free to petition the Supreme Court to adopt our holding in *Menefield*; however, when a pre-AEDPA habeas petition like Bell's is filed in the Ninth Circuit, we and the district courts in this circuit must follow controlling circuit court precedent like *Menefield* that was "foreordained" by Supreme Court precedent. *See Gilmore*, 508 U.S. at 344. Application of *Menefield* in this habeas proceeding does not, therefore, offend the second part of the *Teague* inquiry because *Menefield* itself determined that a state court would have felt compelled by the Constitution and Supreme Court precedent to conclude that Bell was entitled to counsel for his new trial motion.

C.

[6] Our conclusion that the application of *Menefield* in this proceeding does not constitute the impermissible application of a "new rule" under *Teague* is also supported by the simple fact that *Menefield* is a post-*Teague* decision. We decided *Menefield* more than five months after the Supreme Court issued its opinion in *Teague*, but we did not discuss *Teague* in *Menefield*. This demonstrates that we did not view *Teague* as a barrier to granting habeas relief to the petitioner in *Menefield*. If *Teague* did not stand as a barrier to the holding "announced" and applied in *Menefield*, *Teague* cannot now stand as barrier to the application of *Menefield* the second time around in this habeas proceeding ten years later.

Finally, we feel compelled to note that at the most basic level we must give effect to controlling Ninth Circuit precedent in this habeas proceeding because the

determinative issue in this pre-AEDPA proceeding is whether Bell is in state custody in violation of the constitution. *See* 28 U.S.C.A. §§ 2241 and 2254 (West 1994) (amended Apr. 24, by 1996, Pub. L. 104-132). Under controlling Ninth Circuit precedent, Bell is in state custody in violation of the constitution and habeas relief must be granted because Bell was denied his Sixth Amendment right to counsel when the state court denied Bell's request for counsel for his new trial motion. *See Menefield*, 881 F.2d at 701. If we did not affirm the district court's order granting Bell habeas relief and circumvented our express holding in *Menefield*, circuit court precedent would have no precedential value in the pre-AEDPA habeas context. This cannot be the rule of law that governs habeas proceedings that come before this or any other court. The district court did not, therefore, err when it issued an order granting Bell a writ of habeas corpus unless the State of California schedules a motion for a new trial with appointed counsel or a new trial.

AFFIRMED.

RYMER, Circuit Judge, dissenting:

I dissent because the rule announced in *Menefield* v. *Borg*, 881 F.2d 696 (9th Cir. 1989), was not dictated by Supreme Court precedent. A federal writ of habeas corpus cannot issue to a state court based merely on Ninth Circuit case law not dictated by Supreme Court precedent. This violates fundamental principles of federalism. Thus, applying the *Menefield* rule in this case is barred by *Teague* and its progeny.

I

Teague held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague* v. *Lane*, 489 U.S. 288, 310 (1988). To determine whether a case applies a "new rule," we are to engage in a three step analysis:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must"[s]urve[y] the legal landscape as it then existed," *Graham* v. *Collins*, *supra*, 506 U.S., at 468, and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution," *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990). Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle. *See Gilmore* v. *Taylor*, 508 U.S. 333, 345 (1993).

Caspari v. *Bohlen*, 510 U.S. 383, 390 (1994). In surveying the legal landscape, we must determine whether the rule applied by the district court was "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; *see also Gilmore*, 503 U.S. at 335 (holding that rule was not "dictated by prior precedent").

The State contends that for purposes of *Teague* analysis, "dictated by prior precedent" means "dictated by then existing Supreme Court precedent." I agree. But if

this is correct, the district court's application of existing *Ninth Circuit* precedent does not end the analysis. We must then examine whether the Ninth Circuit rule applied by the district court in this case was *dictated* by Supreme Court precedent; in effect, we must examine whether our prior Ninth Circuit decision was dictated by existing Supreme Court precedent. If it were not, as I believe, the district court has applied a "new rule" as defined by *Teague*.

II

That a habeas court may only issue a writ based upon Supreme Court precedent is a result of our concurrent judicial system. As I noted in my concurrence in *Bates* v. *Jones*, 131 F.3d 843, 856 (9th Cir. 1997), the rule outside of the habeas context is that

> [n]o federal court except for the United States Supreme Court has appellate jurisdiction over final decisions of the California Supreme Court. As the United States Supreme Court made clear in *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), when a state court decides a federal constitutional question that actually arose in the cause before it, its decision is open to reversal or modification by the United States Supreme Court. Unless and until that happens, however, it is an effective and conclusive adjudication.

This, of course, is merely a manifestation of "Our Federalism." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

Habeas jurisdiction, however, allows the lower federal courts to review the constitutional decisions of state

supreme courts in limited circumstances. As the Supreme Court has explained:

> It has long been established, as to those constitutional issues which may properly be raised under § 2254, that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question. As might be imagined, this result was not easily arrived at under the Habeas Corpus Act of 1867, the predecessor to 28 U.S.C. § 2254. But the present doctrine, adumbrated in the Court's opinion in *Moore* v. *Dempsey*, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543 (1923), and culminating in this Court's opinion in *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963), is that the Act of 1867 allows such collateral attack.

Sumner v. *Mata*, 449 U.S. 539, 543-44 (1981).

As the leading treatise on habeas review, after a thorough historical examination, concludes, "when Supreme Court review as of right on writ of error has been unavailable or has provided insufficient protection of federal law against state court resistance, Congress has authorized the federal courts to employ habeas corpus . . . as [a] surrogate[ ] for the Court's direct review as of right." 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4e, at 80 (3d ed. 1998); *see also* Paul J. Mishkin, *Forward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 86-87 (1965). It is because of this delegation that, while "[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities

for enforcing the commands of the Constitution," *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990), when sitting as a habeas court, the lower federal courts may overturn the decisions of state supreme courts.

The principle that the inferior federal courts sitting in habeas jurisdiction act as surrogates for the Supreme Court is one of the normative underpinnings of *Teague*. *See* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 Am. J. Crim. L. 203, 240 (1998). And from this comes the principal that habeas courts must only apply those rules that are dictated by Supreme Court precedent. After all, had the state prisoner appeared on a petition for writ of error before the Supreme Court itself, as "sufficed for all [state] prisoners from 1789 until 1815 and 1833," LIEBMAN & HERTZ, *supra*, at 81, the Court would look to its own precedent. *Teague* effectively recognizes that the inferior federal courts, though sitting as surrogates for the Supreme Court, cannot act as the Supreme Court in announcing "new rules"; the inferior courts, as delegates, must apply only those rules dictated by the Court's precedent.

This conclusion is not undermined by either *Gilmore* or *Parke*. In *Gilmore*, the Supreme Court held that the application of a post-conviction Seventh Circuit decision was barred because that decision, *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), was not "foreordained" by "our [the Supreme Court's] precedent." 508 U.S. at 344. The fact that *Falconer* was circuit court precedent was not the issue. The issue was whether Falconer was "dictated by prior precedent." *Id*. at 335.

Similarly, *Parke* v. *Raley*, 506 U.S. 20 (1992), does not subvert this analysis because *Parke* does not reach the

Teague issue. *Id.* at 25-26. While the Sixth Circuit relied on a post-conviction Sixth Circuit decision in that case, the state did not argue that *Teague* applied. *Id.* The Court merely recognized that the state failed to do so. It made no comment as to the propriety of or standard for relying on circuit precedent.

Nor does this conclusion conflict with our recent decision in *Ortega* v. *Roe*, 160 F.3d 534 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 1574 (1999). In *Ortega*, we held that *United States* v. *Sterns*, 68 F.3d 328 (9th Cir. 1995), decided post-conviction, did not announce a *Teague* "new rule" because it was merely an application of a previous circuit decision, *Lozada* v. *Deeds*, 964 F.2d 956 (9th Cir. 1992). We did not examine whether the pre-conviction decision, *Lozada*, was dictated by Supreme Court precedent. But this absence does not imply that the analysis is foreclosed.

In sum, the principles of federalism and comity, combined with a proper conception of habeas jurisdiction, lead me to conclude that a habeas court may only overturn a state supreme court's decision based on then existing *Supreme Court* precedent. This being the case, we must scrutinize the rule announced in *Menefield* to determine whether it was dictated by Supreme Court precedent.

III

The fact that *Menefield* was decided before Bell's conviction does not matter. Nor does the fact that we relied exclusively on Supreme Court precedent mean that our decision was dictated by it. All circuit court constitutional decisions are ostensibly a mere extension of Supreme Court precedent. "But the fact that a court says that its decision is within the 'logical compass' of an

earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*." *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990). *Teague* and its progeny, therefore, make a distinction between those decisions that announce a rule dictated by Supreme Court case law and those that do not.

Given this, the fact that *Menefield* was decided before Bell's conviction is without consequence. The question is whether the rule applied by the district court, post-conviction, was "new" in the *Teague* sense. Merely because the district court relied upon existing circuit court precedent does not, *per se*, mean that the rule applied was dictated by Supreme Court precedent.

IV

It is apparent that the rule announced by *Menefield* and applied by the district court was a "new rule " for *Teague* purposes. This comes from an analysis of *Menefield* itself, and the legal landscape as it existed at the time of the state court decision.

In *Menefield* we recognized that "this circuit ha[d] never settled the question of whether a motion for a new trial is a critical stage of the prosecution." 881 F.2d at 698. Instead of turning immediately to a Supreme Court precedent, we "consider[ed] the *factors* enumerated by the Supreme Court." *Id.* (emphasis added). We examined whether a motion for a new trial involved substantive rights, whether skilled counsel would be useful, and whether the proceeding tests the merits of the case. *Id.* at 698-99. We concluded that a motion for a new trial involves substantive rights and tests the merits of the case not by looking to Supreme Court precedent, but rather by interpreting California law. *Id.* at 699. Similarly we did

not cite a single Supreme Court case when we held that the waiver of the right to counsel at trial did not prevent a defendant from invoking the right on a motion for a new trial. *Id.* at 700-01.

The legal landscape at the time of Bell's conviction indicates that *Menefield* was not dictated by Supreme Court precedent. As the First Circuit recognized in *United States* v. *Tajeddini*, 945 F.2d 458 (1st Cir. 1991) (per curiam) (joined by Breyer, J.), the First Circuit, Second Circuit, and District of Columbia Circuit have held that the Sixth Amendment does not require the appointment of counsel on a motion for a new trial. *Id.* at 470. What is more, the California Court of Appeal implied that the California courts would hold that the appointment of counsel for a motion for a new trial would be discretionary, and rejected *Menefield*'s *per se* reversal rule. *See People* v. *Ngaue*, 280 Cal. Rptr. 757, 761-63 (Cal. Ct. App. 1991).

"[R]easonable contrary conclusions reached by other courts" is an indicator that the rule was not dictated by Supreme Court precedent. *Butler*, 494 U.S. at 415. Where there is a circuit split, it is difficult to see why a state court would have "felt compelled by existing precedent to conclude that the rule [sought by Bell] was required by the Constitution." *Caspari*, 510 U.S. at 390. The only justification for so holding would be an assertion that state courts are bound by the precedent of the circuit in whose territory the State happens to fall. But they aren't.

V

Based on core principles of federalism, comity and the history of habeas jurisdiction, I would hold that a district court applies a new rule when it applies

pre-conviction circuit court precedent that is not dictated by Supreme Court precedent. In this case the rule applied by the district court, as announced in *Menefield*, was not dictated by Supreme Court precedent that pre-dates Bell's conviction. Therefore, I would reverse.

APPENDIX B

LODGED
SEPTEMBER 26, 1997

FILED
[Illegible] 22, 1997

ENTERED
DECEMBER 23, 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDDIE B. BELL, Petitioner, v. R. HILL, et al., Respondents.	No. CV 94-4055-SVW(JG) ~~(PROPOSED)~~ JUDGMENT

IT IS HEREBY ADJUDGED that judgment be entered granting the writ unless the State of California within 60 days of finality of this judgment (unless extended as authorized by state law) schedules either a motion for new trial with counsel appointed for petitioner, or a new

trial, in People v. Eddie Bell, Superior Court No. NA003315 and that the Petition be denied with prejudice in all other respects.

DATED: December, 1997.

[Signature]
Stephen V. Wilson
United States District Judge

APPENDIX C

FILED
DECEMBER 22, 1997

ENTERED
DECEMBER 23, 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDDIE B. BELL, Petitioner, v. R. HILL, et al., Respondents.	No. CV 94-4055-SVW(JG) ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has reviewed the petition, all of the records and files herein, and the attached Report and Recommendation of Magistrate Judge, and the objections to the Report and Recommendation which have been filed herein. The Court concurs with and adopts the findings and

conclusions of the Magistrate Judge after having made a de novo determination of the portions to which objections were directed.

IT IS ORDERED that judgment be entered granting the writ unless the State of California within 60 days of finality of this judgment (unless extended as authorized by state law) schedules either a motion for new trial with counsel appointed for petitioner, or a new trial, in People v. Eddie Bell, Superior Court No. NA003315, and that the petition be dismissed with prejudice in all other respects.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of the Order Adopting and Judgment by United States mail on the petitioner, the Attorney General of the State of California, and the Presiding Judge of the Los Angeles Superior Court, in and for the County of Los Angeles, California.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: This 22 day of December, 1997.

[Signature]
Stephen V. Wilson
United States District Judge

APPENDIX D

FILED
SEPTEMBER 26, 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDDIE B. BELL,	)	No. CV 94-4055-SVW (JG)
Plaintiff,	)	
v.	)	REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (State Habeas Corpus)
R. HILL, et al.,	)	
Respondents.	)	

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Petitioner, an inmate in state custody, was convicted of second degree robbery enhanced by prior convictions. (CT 148-54.) In his amended petition for writ of habeas corpus, he challenges his conviction and sentence on the following grounds:

(1) The prosecutor used his peremptory challenges systematically to exclude African Americans from the jury;

(2) Petitioner was denied his right to counsel at the hearing on his motion for a new trial;

(3) Petitioner was not fully apprised of, and did not effectively waive, his right to counsel;

(4) The trial court interfered with petitioner's right to effective self-representation;

(5) Petitioner received ineffective assistance of appellate counsel; and

(6) Petitioner's 1976 assault with a deadly weapon conviction was erroneously used to enhance his sentence as there was no evidence that petitioner used a dangerous or deadly weapon.[1/]

BACKGROUND[2/]

On April 17, 1990, petitioner entered a Marshall's Department store, took some bed sheets from the domestics department without paying for them, and returned them to the store's service desk for an $80 refund. When store personnel apprehended him, petitioner also had two Mikasa salt and pepper shakers in his possession. Store personnel tried to take petitioner into custody. He put up a struggle and was only placed in custody after construction workers in the parking lot assisted in the apprehension and subdued him.

Following a jury trial, petitioner was convicted of second degree robbery, two prior serious felony convictions and two prior felony convictions for which he had served separate prison terms.[3/] He was sentenced to

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1. The fifth claim in the petition is that the trial court erroneously refused to allow petitioner a continuance to obtain relevant evidence. In the Traverse (Tr.), petitioner conceded this claim did not present a constitutional issue. (Tr., p. 10.) The claim will therefore not be considered.

2. This summary is taken from the opinion of the Court Of Appeal. (Am. Pet., Ex. D; Ret., Ex. A.) The facts relevant to the various claims are included, infra, in the discussion of the issues.

3. The Court of Appeal refers to four priors (Return, Ex. A at

thirteen years in prison. (Ret. Ex. A, p. 43.) The conviction was affirmed on direct appeal, and the petition for review before the California Supreme Court was denied. (Ret., Exhs. A, C.) A petition for writ of habeas corpus to the California Supreme Court was also denied. (Ret., Exhs. D, E.)

DISCUSSION

A. Exclusion Of African-Americans From The Jury

Petitioner challenges the prosecutor's allegedly discriminatory exclusion of African-American jurors. (Am. Pet., p. 6.) Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), held that an African-American defendant stated an Equal Protection claim based on allegations that the prosecutor at his trial had exercised peremptory strikes in a manner allegedly intended to prevent any African-Americans from serving on the petit jury. 476 U.S. at 96-98, 106 S. Ct. at 1722-24.

Under Batson, courts apply a three-step analysis to claims of racial discrimination in the exercise of peremptory challenges:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must

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43.), but the record suggests that the enhancements may derive from just two convictions. (CT 149, 152.) The point is not relevant to the instant case as the only enhancement with which this case is concerned pertains to the 1976 conviction referenced above and discussed infra at 15-19.

> determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59, 111 S. Ct. 1859, 1865-66 (1991) (plurality opinion) (citations omitted).

Toward the end of juror voir dire, the court observed, on petitioner's behalf, that the prosecution had challenged every Black person who was on the jury list. The prosecutor stated that he challenged White jurors as well as Black jurors. (Supplemental Reporter's Transcript (Supp. RT) 123-24.)

The prosecutor observed that, with regard to Black juror Ms. Raines, she was married to a Los Angeles Police Officer and worked in the Compton court system. The prosecutor decided to exclude her from the jury because he believed that she was too close to the process, even though prospective juror Raines felt that she could be fair. (Supp. RT 123-25.)

The prosecutor decided not to keep prospective Juror Ms. Smith on the jury because Ms. Smith was wearing a beeper, for which the prosecutor saw no need in her job as an electrical aircraft mechanic. (Supp. RT 125.)

With regard to the last Black juror, Ms. Parker, the prosecutor initially observed that, because of her quiet demeanor, he believed that she would have difficulty understanding the evidence. When the trial judge pointed out she was an accountant, the prosecutor said "I noticed her mode of dress is quite flashy for a courtroom." The prosecutor stated that she was dressed in a very bright fushia color with very large fushia earrings, and a very low-cut top, which the prosecutor found to be inappropriate for a courtroom. Based on those facts, he exercised his peremptory challenge. (Supp. RT 125-26.)

After the prosecutor finished with his findings, the trial judge resumed proceedings in open court and excused the challenged jurors. (Supp. RT 126.)

The Supreme Court's recent decision in Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, reh. denied, ____ U.S. ____, 115 S. Ct. 2635 (1995) (per curiam), confirms that, at step two, the prosecution is not required to put forth race-neutral reasons that are "persuasive, or even plausible." Id. at 768, 115 S. Ct. at 1771. Instead, the explanations must simply be nondiscriminatory. Id. To require a showing of persuasiveness at step two "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id. at 768, 115 S. Ct. at 1771. The trial court's finding at the third step of the Batson analysis, the ultimate determination of whether the prosecutor acted with discriminatory intent, is a question of fact "which turn[s] primarily on an assessment of credibility," Id. at 769, 115 S. Ct. at 1772, to which the Ninth Circuit has held it is proper to apply the presumption of correctness of state court factual findings under 28 U.S.C. § 2254(d). Jones v. Gomez, 66 F.3d 199, 201 (9th Cir. 1995), cert. denied, ____ U.S. ____, 116 S. Ct. 1437 (1996).

Here, petitioner presented no evidence at any time to support a finding that the peremptory challenges were racially motivated. Although the trial court made no express findings about the race-neutrality of the prosecutor's reasons, the judge was obviously familiar with the Batson requirements and his acceptance of the state's compliance is implicit in his allowance of the challenges. Furthermore, the California Court Of Appeal found that "the record fails to establish systematic exclusion on the basis of group bias" and that "[t]he prosecutor adequately explained neutral tactical reasons for the exercise of the peremptory challenges." (Ret., Ex. A, p. 51.) On this record, petitioner has failed to discredit the prosecutor's racially neutral explanations. The state court's evaluation of the prosecutor's explanations is entitled to great deference (Batson, 476 U.S. at 98, 106 S. Ct. at 1724; See

also 28 U.S.C. § 2254(d); Hernandez v. New York, 500 U.S. at 362, 111 S. Ct. at 1868) and the evaluation must be upheld on this record under the Supreme Court's very forgiving standard. Petitioner's Batson claim fails.

B. Denial Of Counsel On Motion For New Trial

Petitioner claims that the trial court denied him his right to counsel at his post-trial motion for new trial. (Am. Pet., pp. 6-7.) Under Menefield v. Borg, 881 F.2d 696, 701 (9th Cir. 1989), even after trial, "a defendant who requests an attorney at the time of a motion for new trial is entitled to have one appointed, even though he previously waived his right to counsel and represented himself at trial, absent a showing that his request is made in bad faith." United States v. Robinson, 913 F.2d 712, 718 (9th Cir. 1990), cert. denied, 498 U.S. 1104, 111 S. Ct. 1006 (1991); See also Jackson v. Ylst, 921 F.2d 882, 888 (9th Cir. 1990) ("A state prisoner has a right to competent counsel in presenting a new trial motion").

Respondent concedes the existence of a Menefield violation (Ret., pp. 15-17 ("the court's error in denying counsel must be conceded under Menefield"),[4] but

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4. At trial, petitioner waived his right to counsel and elected to represent himself. (Supp. RT 24.) Immediately after the jury returned a guilty verdict and petitioner waived his right to a jury trial on the existence of his prior convictions, petitioner requested counsel to represent him on the motion for new trial. (Reporter's Transcript (RT) 334-44.) The trial court refused to rule on the motion but rather told petitioner he would have to "pay heed to what I tell you when I impose sentence, then you will either get a lawyer or you won't." (RT 344.)

On the date set for the motion for new trial, petitioner sought a continuance to produce new evidence and for counsel. The trial court denied both motions. The court stated that it would not defer imposition of sentence for several months so a transcript of the trial proceedings could be prepared to enable petitioner to have counsel

argues that the violation was harmless error and that Menefield was wrongly decided. Neither of these arguments has any merit on the present state of the law in this circuit. Menefield itself holds that the failure to provide counsel on a motion for new trial is reversible per se. Menefield, 881 F.2d at 701 n.7. Furthermore, although both California and other federal circuit courts have rejected Menefield's holding that a post trial motion for new trial is a "critical stage" of the proceedings to which the right to counsel attaches[5], Menefield is still the controlling authority on the issue in the Ninth Circuit, and this court is bound to follow it. Respondent also argues that the remedy "should be limited to granting petitioner leave to file a motion for new trial in the state trial court, with the assistance of counsel, as an alternative to granting the writ." (Ret., pp. 24-25.) The best resolution of this issue is to take the approach suggested in Menefield:

> Following remand, the state court must determine whether, in the circumstances of this case, Menefield can receive as adequate review of his conviction by newly appointed counsel as he would have had if he had been represented by counsel on his motion for new trial in the first instance. It may be that, because of the passage

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to represent him at a motion for new trial. (RT 347-48.)

5. See. e.g., United States v. Tajeddini, 945 F.2d 458, 470 (1st Cir. 1991), cert. denied, 505 U.S. 1211, 112 S. Ct. 3009 (1992) ("This circuit and others . . . have held that a federally convicted defendant is not entitled under . . . the Sixth Amendment[] to appointment of counsel on a motion for new trial"). The one California court to cite Menefield hag also suggested that the California Supreme Court would not follow it. People v. Ngaue, 229 Cal. App. 3d 1115, 1124, 280 Cal. Rptr. 757, 762 (1991) ("Burton thus suggests the Menefield principle that counsel must be appointed to assist in a new trial motion unless the prosecution can prove an improper motive for the request would not be accepted by our state supreme court. . . .").

> of time or problems in reconstructing the record, he cannot, in which case a new trial may be necessary.

Menefield, 881 F.2d at 701 n.7. Thus, the recommendation will be that judgment be entered granting the writ unless the State of California, within 60 days of finality of the judgment (unless extended as authorized by state law) schedules either a motion for new trial (with appointed counsel for petitioner or a new trial.

B. Substitution Of Counsel; Ineffective Waiver Of Right To Counsel

Petitioner contends the court erroneously denied his motion for substitution of counsel and denied him his right to counsel. He claims he did not effectively waive his right to counsel because when he advised the court that he would represent himself if different counsel were not appointed, the court did not inquire into his attorney's state of mind. (Pet., p. 7.)

Although petitioner claims he requested new counsel on September 6, 1990, the transcript of the hearing shows that he did not do so, but rather sought to waive his right to counsel and assert his right to self-representation. (Supp. RT 1-26.)[6/] The court granted petitioner's motion.

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6. The closest petitioner came on September 6 to saying he wanted substitution of counsel was the following:

> THE COURT: All right. . . . And you have never represented yourself before, though.
>
> THE DEFENDANT: No, sir. I've always relied upon an attorney and would like to do that in this situation up until the present circumstances took place. And then I decided I would proceed.

(CT 59, Supp. RT 1, 24). In addition, the Clerk's minutes for September 5, 1990, do not indicate that any motion for substitution of counsel was made. (CT 58.)[7] Further, in his motion to set aside the information which was filed on September 4, 1990, petitioner listed numerous complaints against his prior attorney, Mr. Brown, but said nothing about Mr. Smith.[8]

With respect to a motion for self-representation, there is no need for the trial court to inquire into the attorney's state of mind in order for a waiver of the right to counsel to be valid. "[U]nder the sixth amendment a criminal defendant has the right to waive his right to counsel and represent himself." United States v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990), cert. denied, 498 U.S. 1104, 111 S. Ct. 1006 (1991) (citing Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)).[9] "In order to invoke the right to self-

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(Supp. RT 3-4 (emphasis added).)

7. Petitioner claims that on September 5, 1990, he advised the court that Mr. Smith was not adequately representing him, and that if different counsel were not appointed he would represent himself. He further claims he told the court that Mr. Smith had not prepared any defense and had failed to follow up on an eyewitness Bell believed to be exculpatory. (Ret. Ex. D, pp. 112-13.) The record does not include a transcript of the September 5, 1990 proceedings.

8. Bruce Brown represented petitioner at his May 2, 1990 preliminary hearing. (CT 1.) On June 20, 1990, Richard Smith was substituted as defense counsel due to a conflict of interest. (CT 46). On September 4, 1990, petitioner filed a "Motion To Set Aside Information" under Cal. Pen. Code § 995, claiming Mr. Brown's representation at his preliminary hearing had been so deficient that the charges should be dismissed, or in the alternative, that he should be given another preliminary hearing. (CT 53.)

9. The Ninth Circuit Court of Appeals "generally require[s] that the defendant be made aware of the 'three elements' of self-representation: '[I]t must be established that the defendant was "aware of the nature of the charges against him, the possible

representation, the request must be (1) knowing and intelligent, (2) unequivocal, (3) timely, and (4) not for purposes of delay." Peters v. Gunn, 33 F.3d 1190, 1192 (9th Cir. 1994). The record shows that these requirements were satisfied. (Supp: RT 1-26.) The petition will also be denied as to this ground.

C. Failure To Grant A Continuance

Petitioner contends the trial court violated his Sixth Amendment right to effective self-representation by refusing to grant him a continuance of trial past October 10, 1990.

The Ninth Circuit Court Of Appeals has cited four factors that courts have considered when faced with the issue of whether the trial court should have granted a continuance:

> First, we look to the degree of diligence by the appellant prior to the date beyond which a continuance is sought. Second, we consider whether the continuance would have served a useful purpose if granted. Third, we weigh the inconvenience that granting the continuance would have caused the court or the government. Fourth, we look to the amount of prejudice suffered by the appellant. These factors must be considered together, and the weight given to any

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penalties, and the dangers and disadvantages of self-representation."" United States v. Mohawk, 20 F.3d 1480, 1484 (9th Cir. 1994) (quoting United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987)). Petitioner does not contend that the trial court did not comply with these requirements. The record shows that the trial court did, in fact, comply. Petitioner knew the nature of the charges against him, and the maximum sentence in his case (Supp. RT 1-3; CT 154), was advised of the dangers of self-representation (Supp. RT 1-6) and was told that, were he to assume self-representation he would be treated as an attorney. (Supp. RT 21.)

> one may vary from case to case. At a minimum, however, in order to succeed the appellant must show some prejudice resulting from the court's denial.

Armant v. Marquez, 772 F.2d 552, 556-57 (9th Cir. 1985), cert. denied sub nom. Bunnell v. Armant, 475 U.S. 1099, 106 S. Ct. 1502 (1986).

On September 25, 1990, petitioner requested a continuance of trial on the grounds that (1) he had been pro per since September 6, 1990, but had only been allowed to go to the law library since September 13, 1990, (2) he had received no funds or materials, (3) the investigator had not interviewed any witnesses, (4) discovery had not been complied with, and (5) he had not received court ordered prescription eyeglasses. (Supp. RT 28-29; Ret., Ex. D, p. 121.) The court denied his motion and trial remained set for October 2, 1990. (Supp. RT 28, 41; CT 70.) Trial began on October 10, 1990, and, on October 12, 1990, the jury convicted petitioner of Second Degree Robbery. (CT 85-87, 148-49.)

Granting, for purposes of argument, the first three Armant factors, petitioner's claim fails because he has not shown any prejudice. On September 6, 1990, when his motion to represent himself was granted, petitioner agreed to be ready for trial on October 2, 1990. (CT 59; Supp. RT 24.) As to the law library, petitioner had library privileges for two hours a day from September 13, 1990. (Supp. RT 28.) When he requested self-representation, he knew he would only have library access two hours a day. (Supp. RT 21-23.)

As to funds, on September 6, 1990, the court granted petitioner all pro per privileges including a forty dollar allowance. (Supp. RT 25.) On September 12, 1990, the court appointed a legal runner and ordered that the runner be compensated. (CT 61.) Petitioner claims he received no funds and the runner received no

compensation (Supp. RT 28; Ret., Ex. D, p. 132) but he does not show how he was injured.[10/]

As to the investigator, the investigator attempted to contact witnesses, but had only reached one, Janice Coleman, who had told him that her employer, the store where the robbery took place, had advised her not to talk to him. (Supp. RT 37-38.) Petitioner stated that he understood that the court could not use its subpoena power to force Ms. Coleman to talk to the defense prior to trial. (Supp. RT 37, 40.) The investigator did receive the name of an additional witness on September 24, 1990. (Supp. 29-30.) Petitioner, however, has not shown that pre-trial interviews with this or any other witnesses would have resulted in a more favorable outcome at trial.[11/]

As to discovery, the court noted that petitioner had everything that was available, and ordered that, if the prosecutors should find anything petitioner should have, they should turn it over to petitioner. (Supp. RT 44.)

As to eyeglasses, petitioner has not demonstrated that he was unable to read, or excluded the availability of reading assistance from his runner or another inmate. He claimed only that his eyes were bothering him because he had been working through the night (Supp. RT 29 , but

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10. Further, it appears he had access to other funds. (Supp. RT 29.)

11. Moreover, it is evident that petitioner made use of his resources. On September 14, 1990, the investigator processed a subpoena duces tecum for the personal clothing petitioner was arrested in. This subpoena had not been complied with prior to the trial date. (Ret., Ex. D, pp. 120-21, 129-31.) On September 17, 1990, the investigator processed a subpoena for the daily time records and assignment sheets of Mary Jappe and Janice Coleman, two Marshall's Department Store employees. This subpoena was served on the Sheriff's Department and had been partially complied with as of the trial date. (Ret., Ex. D, pp. 120-21, 129-30.) The court also provided the investigator an order authorizing him to take photographs inside the store where the crime occurred. (Supp. RT 39.)

did not regularly wear eyeglasses. (RT 10-11.) The court ordered that he be given eyeglasses (Supp. RT 53), but refused to delay the trial because petitioner did not have eyeglasses. (RT 11.)

In sum, it appear that the trial court took reasonable measures to facilitate defendant's preparation, and there is nothing in the record to suggest that those measures were in any way frustrated by state action. Beyond that, petitioner has made no showing of actual injury or prejudice from the alleged deprivations. Lewis v. Casey, ____ U.S. ____, 116 S.Ct. 2174, 2180-81 (1996).

D. Ineffective Assistance Of Appellate Counsel

Petitioner claims his appellate counsel was ineffective. To prevail, he must meet the two part standard of (1) deficient performance and (2) prejudice. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, reh. denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984). This standard applies at both the trial and appellate levels. Miller v. Keeney, 882 F.2d 1428 (9th Cir. 1989). To show prejudice, petitioner must show that his counsel's deficient representation has rendered his conviction unreliable or unfair. Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S. Ct. 838, 842-43 (1993).

Petitioner claims his appellate counsel, Dennis Cava, was ineffective for failing to raise a claim of ineffective assistance of trial counsel on direct appeal. Petitioner alleges that Mr. Smith, his second trial counsel, was ineffective because he did not obtain court records regarding the priors and did not challenge the information under California Penal Code section 1012 so as to obtain more specific notice of which specific categories of felonies the prosecution intended rely upon for enhancement purposes. (Am. Pet., P. 7a; Tr., pp. 10-13.)

Mr. Cava considered and rejected petitioner's proposed arguments, but gave petitioner the opportunity

to raise them himself. In a letter dated October 16, 1992, Mr. Cava advised him that he deemed petitioner's suggested arguments unmeritorious, but told petitioner he could ask the Court Of Appeal for permission to file a "supplemental brief" raising these arguments on his own if he wished. (Am. Pet., Ex. C.)[12/]

Petitioner has not shown that he was prejudiced by his appellate counsel's failure to allege that Mr. Smith had been ineffective. As discussed below, the record before the trial court established that petitioner had used a knife in the 1976 prior conviction.[13/] Further, when Mr. Smith was relieved and petitioner undertook to represent himself, no reason appears why he did not cure the deficiency of which he complains. It is well-settled that a pro se defendant cannot complain that his own errors or omissions amounted to a denial of effective assistance of counsel. Faretta v. California, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 (1975).

Since trial counsel has not been shown to have been ineffective, it follows that appellate counsel was not incompetent, and petitioner was not prejudiced, by reason of appellate counsel's failure to pursue the issue on appeal. United States v. Moore, 921 F.2d 207 210-11 (9th Cir. 1990).

E. Sentence Enhancement

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12. In his traverse, petitioner states that appellate counsel's ineffectiveness "compelled petitioner to prepare his own petition for a writ of habeas corpus, alleging this and other facts surrounding the handling of his appeal following trial." (Tr., p. 12.)

13. Even assuming that Mr. Smith might have obtained this information earlier, he fact is that the record itself was controlling, whenever it was found, and petitioner could not have been prejudiced by an delay.

Petitioner received a sentence of thirteen years--three years for his robbery conviction plus two five-year enhancements. (CT 149, 152, 154.) Petitioner challenges the enhancement based on this 1976 conviction for assault with a deadly weapon (Los Angeles County Court Case No. A015035). (CT 152.)

The enhancement in question was based on California Penal Code Sections 667 and 1192.7 (23). Section 667 provides, in pertinent part, that ". . . any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five year enhancement for each prior conviction on charges brought and tried separately." Cal. Pen. Code § 667. Penal Code Section 1192.7 (23) defines a serious felony" as "any felony in which the defendant used a dangerous or deadly weapon." Petitioner claims it was not proven that he used a dangerous or deadly weapon in the 1976 assault with a deadly weapon conviction. This claim is utterly without merit.

At the trial on the instant case, petitioner waived his right to have the priors tried by a jury. (2 RT 337-40.) The trial court received into evidence a copy of a minute order showing that petitioner had been convicted of assault with a deadly weapon. Petitioner claimed that there was no weapon involved in Case No. A015035. The court responded that, "[t]he crime, by definition, is not proved unless a deadly weapon is somewhere evidenced in the trial process. So there is no separate enhancement." The prosecutor then directed the court to "a record of appeal in [the 1976] case, the probation report and the preliminary transcript, which indicates the defendant used a knife to slash the abdomen of a bouncer at a bar." (2 RT 342-43.) The trial court then found the prior to be true. (2 RT 342.)

On appeal, the Court Of Appeal held as follows:

> The contention that the proof of a weapon use was inadequate to establish that the 1976 felonious assault was a serious felony conviction is unavailing. The superior court file before the court for the 1976 felonious assault included the record on appeal, the probation report and a preliminary hearing transcript. These documents were received into evidence without objection and demonstrated that the allegations appellant admitted during his plea[14/] were that appellant had assaulted a bouncer at a bar with a knife. Such evidence was sufficient to establish that the prior conviction was for a serious felony. (citations omitted.)

(Ret., Ex. A, p. 52.)

Petitioner contends his sentence was improperly enhanced based on the 1976 conviction because (1) personal use of a dangerous or deadly weapon is not a necessary element of assault with a deadly weapon, and (2) there is no evidence that he personally used a dangerous or deadly weapon. (Am. Pet., p. 7a.) His sole basis for this contention is an unauthenticated document of unknown origin or authorship from the California Department of Corrections which states that personal use of a deadly or dangerous weapon was "not proved." (Tr., p. 13; Tr. Ex. C.)

At the request of the court, respondent has lodged the reporters transcripts on appeal and the Superior Court file in the 1976 case (People v. Bell, Case No. A015035). These documents indisputably disprove petitioner's

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14. The reference to a plea is ambiguous. As petitioner notes, he did not plead guilty but was rather found guilty after a court trial. (Am. Pet. p. 7a; CT 51-53.) The Court of Appeal may be referring to petitioner's statement to the probation officer. See Supp. Response, Supp. Docs 632.

contention and validate the decision of the Court of Appeal.[15/] At trial, Stephen Farrer, one of the victims testified as follows:

Mr. Bozanich:	Now after you felt the third jab, what did you do?
Mr. Farrer:	Well, I had Eddie Bell in my grasp then.
Mr. Bozanich:	Okay. How did you have him in your grasp?
Mr. Farrer:	I had my arms or my hands around his arms.
Mr. Bozanich:	Up until this point in time when you had your hands around defendant's arms had you seen a weapon during this entire confrontation?
Mr. Farrer:	No.
Mr. Bozanich:	Was there anybody else to your left as you turned around and saw Mr. Bell?
Mr. Farrer:	No.
Mr. Bozanich:	How far was he from you when you felt the third jab?
Mr. Farrer:	Very close.

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15. Contrary to petitioner's contention, the state courts could properly look to the entire record of the prior conviction to determine the nature of that conviction. People v. Guerrero, 44 Cal.3d 343, 355, 243 Cal. Rptr. 688, 695, 748 P.2d 1150, 1157 (1988); People v. Goodner, 226 Cal.App.3d 609, 614, 276 Cal. Rptr. 542, 544 (1991) ("In light of the Supreme Court's ruling in People v. Guerrero [cite], a trial court may now look behind the bare judgment of conviction to determine, from the entire record, whether the conviction involved the burglary of an inhabited residence"). The question is, in any event, one of state law and has no constitutional dimension. Miller v. Vasquez, 868 F.2d Vasquez, 868 F.2d 1116, 1119 (9th Cir. 1989), cert. denied, 499 U.S. 963, 111 S. Ct. 1591 (1991).

Mr. Bozanich: Well, could you estimate for us with your hands?

Mr. Farrer: Maybe a foot and a half, two feet.

Mr. Bozanich: Okay. Now when you put your hands on the defendant's arms what was the next thing that happened?

Mr. Farrer: I pushed him off.

Mr. Bozanich: Pushed him off of what?

Mr. Farrer: Well, I grabbed hold of him and I just threw him.

Mr. Bozanich: Threw him where?

Mr. Farrer: He landed on the car parked at the curb.

Mr. Bozanich: After you felt the third jab that evening, did you see any weapons?

Mr. Farrer: Yes.

Mr. Bozanich: First of all what sort of weapon did you see?

Mr. Farrer: Knife.

Mr. Bozanich: Could you describe the knife?

Mr. Farrer: It looked like a buck knife to me which was about a five inch blade.

Mr. Bozanich: And did anybody have that knife in his hand?

Mr. Farrer: Yes.

Mr. Bozanich: Who?

Mr. Farrer: The defendant.

Mr. Bozanich: And when was the first time you saw the knife?

Mr. Farrer: When he was on the hood of the car.

Mr. Bozanich: Did you see any motions or movements at any time --I

> will withdraw that question, if I might please, your Honor. Now after the defendant landed by the car what happened?
>
> Mr. Farrer: He rolled off the car onto the otherside (sic) to the street and he waived the knife around a few times and then he took off running.

(Case. No. 015035, RT 45-46.)

In addition, according to the probations officer's report, petitioner orally claimed "to not know for sure that he cut anyone but does remember taking a knife away from one of the people attempting to eject him." (Supp. Response, Supp. Docs 632.)

The trial court found petitioner guilty of assault with a deadly weapon (Case No. A015035, CT 51, 53), and stated:

> There is no real excuse for what you did. If there was a real excuse, I wouldn't be putting you in jail, but there were circumstances which impressed the Court as probably explaining in part what you did. You had some pretty big boys come at you. I know that, <u>but that is no excuse for pulling a knife and stabbing a man in the belly which you did. In spite of what you say. I don't believe you when you say you didn't use that knife.</u>

(Case No. 015035, CT 21) (emphasis added.)

Beyond that, his unsuccessful motion for new trial in the 1976 case was based on the contention that the verdict was contrary to the evidence in that he did not stab anyone. (Case No. 015035, CT 54-58.) It is therefore abundantly clear from the record of the 1976 proceedings that petitioner was found guilty of using a dangerous

weapon, and the petition must therefore be denied on this ground as well.

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that this court issue an order:

(1) approving and adopting this Report and Recommendation; and,

(2) directing that judgment be entered granting the writ unless the State of California within 60 days of finality of this judgment (unless extended as authorized by state law) schedules either a motion for new trial with counsel appointed for petitioner, or a new trial, in People v. Eddie Bell, Superior Court No. NA003315 and further directing that the petition be denied with prejudice as to the remaining contentions raised herein.[16/]

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16. Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file objections with the above-named District Judge within 10 days (20 days, if in custody and unrepresented), as provided in Rule 3.1.04 and .05 of the Local Rules Governing Duties of Magistrate Judges and Fed. R. Civ. P. 72. The failure of either party to object to a particular finding of fact or conclusion of law may constitute a waiver of the right to contest the matter on appeal. Smith v. Frank, 923 F.2d 139, 141 (9th Cir. 1991); Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991). A notice of appeal pursuant to the Federal Rules of Appellate Procedure should not be filed until Judgment has been entered. Please note that the rules do not contemplate the filing of declarations, documents or other new factual material in support of objections, and the District Judge may decline to consider any such new matter.

DATED: This 26 day of September, 1997.

[Signature]
R. J. GROH, JR.
United States Magistrate Judge

APPENDIX E

Supreme Court
FILED
June 23, 1993
Robert Wandruff, Clerk
P. Quinn, Deputy

Second Appellate District, Division Two, No. B056477
S032494

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

EDDIE BELL, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

Supreme Court
FILED
May 18, 1994
Robert Wandruff, Clerk
[Initials], Deputy

ORDER DENYING WRIT OF HABEAS CORPUS
No. S037549

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE EDDIE B. BELL

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

LUCAS
Chief Justice

APPENDIX F

NOT TO BE PUBLISHED

COURT OF APPEAL - SECOND DISTRICT
FILED
MARCH 24, 1993
JOSEPH A. LANE, CLERK

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
DIVISION TWO

THE PEOPLE,	No. B056477
Plaintiff and Respondent,	(Super.Ct.No. NA003315)
v.	
EDDIE BELL,	
Defendant and Appellant.	

THE COURT:*

Eddie Bell appeals from the judgment entered following a jury trial that resulted in his conviction of second degree robbery with findings by the court of two prior serious felony convictions and two prior felony convictions for which he served separate prison terms. (Pen. Code, §§ 211, 667, subd. (a), 667.5, subd. (b).) He

* BOREN, P.J., GATES, J., and FUKUTO, J.

contends: "I. Appellant was deprived of his federal and state constitutional right to a jury drawn from a representative cross-section of the community as the result of the prosecutor's improper use of his peremptory challenges to systematically exclude blacks from the jury. II. The trial court committed reversible error in denying appellant's request for the appointment of counsel to represent him at the hearing regarding his motion for a new trial. III. The five-year enhancement pursuant to section 667(a) of the Penal Code as the result of appellant's 1976 conviction for assault with a deadly weapon must be invalidated because from the record there is no evidence that appellant personally used a deadly or dangerous weapon during the commission of the offense."

Viewed in accordance with the usual rules on appeal (People v. Barnes (1986) 42 Cal.3d 284, 303) the evidence established that on April 17, 1990, appellant entered Marshall's Department Store in Long Beach. He took bed sheets from the domestic department without paying for them. Almost immediately, he returned the sheets at the store's service desk for about an $80 refund. When apprehended, he also had in his possession two Mikasa salt and pepper shakers belonging to the store. When store personnel attempted to take him into custody, he put up a struggle and was only placed in custody after construction workers in the parking lot outside assisted and were able to subdue him.

During jury voir dire, the court called the prosecutor and appellant, who was in propria persona, to the side bar. Addressing the prosecutor, the court commented the prosecutor had "systematically" excused the three potential black jurors from the panel. The court then turned to appellant and said, "[Y]ou have made no objection to it." The court said it wanted the record to reflect the side bar conference so that appellant could not later claim any

adverse effect from the prosecutor's exercise of peremptory challenges. Appellant replied that he wanted to bring "it" to the court's attention later because "there was only two in the audience." Appellant's only comment was "It seems to be a regular practice."

The court told appellant that now was the time to object and inquired of the prosecutor if he was "still going to exercise [his] peremptory challenge." The prosecutor said he would make a record if the court wished, but appellant had not objected and any showing on the People's part was inappropriate. At the court's request, the prosecutor nevertheless stated that one of the black women against whom he had exercised a peremptory challenge was closely associated with the local police department and was married to a police officer. She worked in the "Compton court system." The prosecutor explained he used a peremptory challenge against her because he believed she was "too close to the process" and might have biases precluding appellant from receiving a fair trial. The prosecutor explained that another black juror claimed to be an electrical aircraft mechanic. But the juror had a beeper, which the prosecutor thought peculiar for one in that profession. Accordingly, he had used a peremptory challenge against that potential juror.

The court said it was not concerned about the exercise of a peremptory challenge against these potential jurors. It was concerned with the last peremptory challenge the prosecutor exercised against a black woman. The prosecutor replied that the woman's demeanor was too quiet and there was evidence in the case which his felt the woman might not comprehend. The court observed that the woman was a practicing accountant and queried as to a claimed lack of intelligence. The prosecutor then said that her mode of dress was "quite flashy for a courtroom" since she was dressed in bright fuchsia, with large fuchsia earrings and a low-cut top.

The court reiterated that it wanted the prosecutor's comments on the record so the issue later could not be raised on appeal. The court asked the prosecutor again if he still wished to exercise the People's peremptory challenge against the last of the black potential jurors and the prosecutor replied, "Yes."

The information charged appellant with two five-year prior serious felony enhancements within the meaning of Penal Code section 667, subdivision (a), and two one-year prior separate prison term enhancements within the meaning of Penal Code section 667.5, subdivision (b). Appellant waived a jury trial on the enhancements, then objected to any prior serious felony conviction finding in case number A015035, the 1976 conviction for assault with a deadly weapon. Appellant claimed that in that case there was a question as to his personal use of a weapon and it was "not proven in the information." The prosecutor directed the court to the record of the appeal, the probation report, and the preliminary hearing transcript in that case, all which the prosecutor said demonstrated appellant used a knife during the assault to slash the abdomen of a bouncer at a bar. The prosecutor urged that no more was required than factual proof somewhere in the case record that the felonious assault involved use of a deadly weapon in order to establish a serious felony conviction. The court considered the superior court files, the cases alleged as priors and the documents from the Department of Corrections and found all the charged enhancements true.

The court set sentencing for October 31, 1990, and asked appellant and the prosecutor to file with the court by October 26, 1990, their written statements in aggravation and mitigation. Appellant said, "Your Honor, if I may be heard in regard to a new trial motion. [¶] Do I have to -- I read the section -- it is not all that -- quite clear to me, as to what I really need to do, whether or not a new trial is ordered. [¶] So, I would request the court

to reappoint the attorney that I had, either an attorney to assist me in that matter --" The court said it would advise appellant of the rights he had to counsel at the time the court imposed sentence on October 31, 1990. Appellant started to ask a question about the new trial motion and mentioned "not necessarily for appeal." The court interrupted him and said, "It is not untimely -- the case is not over until I impose sentence, and you have a certain period of time following the imposition of sentence to request a new trial." The court admonished appellant that if he wanted an attorney, he would have to follow the court's instructions at sentencing. Then appellant would "either get a lawyer or he [would not]. . . . [¶] But you will be entitled to one."

On October 31, 1990, appellant filed a written motion for continuance, stating he needed time to address the probation report as he had not previously seen it and that he wished to file a statement in mitigation. The October 31, 1990, minute order reflects that the sentencing proceedings and hearing on the motion appellant filed that date were continued to November 6, 1990.[1]

Before the November 6, 1990, sentencing proceedings commenced, the court heard the motions appellant had previously filed. The superior court file reflects that on November 1, 1990, appellant filed a written motion for the appointment of counsel, claiming he was presently proceeding in propria persona and "experiencing considerable psychological stress, anxiety, and tension in the preparation of [his] post-trial proceedings." He said he was not "skilled or familiar with legal avenues of travel towards effectuating New Trial Motions or Pre-Sentencing reports." He asked for the appointment of a particular defense counsel, an attorney he had spoken to at the time of his arrest who was familiar with the case, but at that

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1. The reporter's transcript of the October 31, 1990, proceedings is not in the record.

time he could not afford to hire. That day, he also filed a written motion requesting a continuance "to effectuate a change of attorney" and for counsel to file a new trial motion.

On November 6, 1990, he filed another motion for continuance, claiming newly discovered evidence. He declared that before trial he was aware there was an eyewitness at the service desk who observed what occurred prior to the approach of store personnel. He claimed that subsequent to trial he had located the witness.

Before the oral proceedings of sentencing commenced on November 6, 1990, appellant told the court, on October 15, 1990, he had requested appointment of an attorney to prepare his new trial motion and the court said it would hear that motion at sentencing. The court replied that it wished to handle one motion at a time. The court thereafter denied appellant's motion for a continuance, commenting that there was no need to "drag" the matter out. The court further commented that appellant did an able job of defending himself at trial, but he was convicted, and the matter was set for sentencing.

The court then gave appellant the opportunity to move for a new trial. Appellant replied that he anticipated having counsel for the motion for new trial and the court had not ruled on his motion for counsel. The court denied the motion, commenting that it saw no reason to appoint counsel as there was nothing an attorney could do for him. Appointing new counsel would involve a lengthy continuance for the preparation and review of the trial transcripts. The court said appellant had assumed the risk by representing himself at trial.

The Court then commenced the sentencing proceedings. Appellant interrupted the court and said that, on October 15, 1990, the court told appellant it would hear the new trial motion at sentencing but was now denying his motion as untimely. The court replied,

"No, I did not. I did not do that. You misunderstood, and it is part of your lack of legal training which creates this miasma of misconception that you have." The court explained that, at the previous date set for sentencing, October 31, 1990, the court and prosecutor had agreed to continue sentencing to November 6, 1990, to accommodate appellant's new trial motion.

The court then sentenced appellant to the middle term of three years, enhanced by ten years for the prior serious felony conviction enhancements, for an aggregate prison term of thirteen years. In commenting on appellant's sentence, the court said that appellant represented himself as well as most attorneys and that he appeared intelligent, and it was a pity that he had become a drug abuser and criminal. After sentencing, appellant again objected that the enhancements were improperly found true as the use of a weapon was "not proven in accordance to statute."

The contention that the prosecutor systematically used his peremptory challenges to deny appellant a jury drawn from a representative cross-section of the community lacks merit. Apart from whether appellant's failure to object precludes review (People v. Hayes (1990) 52 Cal.3d 577, 604-605, fn. 2), the record fails to establish systematic exclusion on the basis of group bias. The prosecutor adequately explained neutral tactical reasons for the exercise of the peremptory challenges. On this record, appellant has failed to demonstrate a denial of his right to a representative jury. (People v. Clair (1992) 2 Cal.4th 629, 652-653; People v. Howard (1992) 1 Cal.4th 1132, 1153-1156.)

The contention that the court committed reversible error by failing to appoint counsel to advise appellant as to a motion for new trial also lacks merit. Apart from whether appellant made the motion for new counsel in a timely manner, the record discloses no ground upon which appellant might have obtained a new trial. Appellant

urges on this appeal that he is entitled to per se reversal, not that he suffered any prejudice which is prerequisite to a reversal. It appears trial counsel would have been of no additional aid to appellant at sentencing and the trial court did not abuse its discretion in denying the new trial motion. (People v. Ngaue (1991) 229 Cal.App.3d 1115, 1122-1126; cf. Menefield v. Borg (9th Cir. 1989) 881 F.2d 696, 699.)

The contention that the proof of a weapon use was inadequate to establish that the 1976 felonious assault was a serious felony conviction is unavailing. The superior court file before the court for the 1976 felonious assault included the record on appeal, the probation report and a preliminary hearing transcript. These documents were received into evidence without objection and demonstrated that the allegations appellant admitted during his plea were that appellant had assaulted a bouncer at a bar with a knife. Such evidence was sufficient to establish that the prior conviction was for a serious felony. (People v. Guerrero (1988) 44 Cal.3d 343, 355; People v. Equarte (1986) 42 Cal.3d 456, 464-466; People v. Goodner (1992) 7 Cal.App.4th 1324, 1329-1332.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

APPENDIX G

FILED
OCTOBER 27, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE B. BELL,	)	No. 98-55323
	)	
Petitioner-Appellant,	)	DC# CV-94-04055-SVW
	)	
v.	)	Central District of California
	)	
DON R. Hill, Warden,	)	
	)	ORDER
Respondent-Appellee.	)	
	)	

Before: BRUNETTI, RYMER, and SILVERMAN, Circuit Judges.

Judge Brunetti and Judge Silverm[a]n have voted to deny appellant's petition for rehearing. Judge Rymer has voted to grant appellant's petition for rehearing. Judges Brunetti, Rymer, and Silverman have voted to deny appellant's suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and suggestion for rehearing en banc are denied.

FILED
NOVEMBER 9, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE B. BELL,	)	No. 98-55323
	)	
Petitioner-Appellee,	)	DC# CV-94-04055-SVW
	)	Central District of
v.	)	California (Los Angeles)
	)	
DON R. HILL, Warden,	)	ORDER
	)	
Respondent-Appellant.	)	
	)	

Before: BRUNETTI, Circuit Judge.

Appellant Hill's motion to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court is granted. The mandate is ordered stayed for 90 days to permit for the filing of a certiorari petition. If a petition is filed, the stay will continue until the Supreme Court's final disposition. FRAP 41(d)(2).